<u>THIS OPINION WAS NOT WRITTEN FOR PUBLICATION</u>

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE
_____

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES
_____

<u>Ex parte</u> RICHARD BEALKOWSKI,
RALPH M. BEGUN
AND LOUIS B. CAPPS, JR.
_____

Appeal No. 95-3648
Application 07/777,844[1]
_____

ON BRIEF
_____

Before THOMAS, FLEMING and TORCZON, <u>Administrative Patent Judges</u>.

THOMAS, <u>Administrative Patent Judge</u>.

<u>DECISION ON APPEAL</u>

Appellants have appealed to the Board from the examiner's

final rejection of claims 22 to 27, appellants having canceled

claims 1 to 21.

The pertinent portion of independent method claim 22 and

independent apparatus claim 25 on appeal is the determination of

which of a cold-start firmware memory and an alternate firmware

_____

[1] Application for patent filed October 16, 1991.

memory has a newer version of the firmware, and selecting which

of these two memories with the newer version of firmware as an

active memory for continued initialization of the whole data

processing system.

The following reference is relied on by the examiner:

Smith   5,129,080   July 7, 1992
                                                (filed Oct. 17, 1990)

Claims 22 to 27 stand rejected under 35 U.S.C. § 103. As

evidence of obviousness, the examiner relies upon Smith alone.

<div align="center">OPINION</div>

We reverse the outstanding rejection of claims 22 to 27

under 35 U.S.C. § 103.

Smith operates in a fault detection and recovery environment

by partitioning as much of the overall data processing system's

software as possible into independent self-contained modules or

operational units. Each module is, in fact, two copies of the

software code and data space of the operational unit, where one

of the copies is called the Primary Address Space (PAS) and a

second copy called the Standby Address Space (SAS), the latter of

which runs on a separate processor as depicted in Figure 2C of

Smith. When a supervisory availability management function (AMF)

detects an error in or related to a PAS, the above-noted SAS

becomes functionally, the PAS. The examiner appears to consider

the claimed primary initialization to correspond to the normal

operating mode utilizing the PAS and the continuing initiali-

zation requirement of the claims on appeal as being correlated to

the fault recovery operation of the system based upon the SAS.

Both the appellants and the examiner recognize that Smith

does not explicitly teach a determination of a newer version of

the firmware. However, as expressed by the examiner on page 4 of

the answer, the examiner considers that it would have been

obvious to check for a newer version of the firmware between the

PAS and the SAS because it would be more up-to-date and more

efficient. Additionally, as expressed at page 5 of the answer,

the examiner appears to view that the state difference deter-

minations between modules in Smith "can easily include the

version of the firmware being different."

We regard such reasoning of the examiner as to the newer

version requirement of the claims on appeal as being based upon

pure speculation and/or prohibited hindsight. We are inclined to

agree with the appellants' reasoning at the bottom of page 6 of

the brief that it is likely that the PAS and SAS are the

same version. As expressed there, appellants' reasoning is well-

taken that if they were different versions, then operational or

functional confusion would have existed within the system when

the SAS would have taken over the operation from a failed PAS. As we see it, the reasoning of the examiner would have effec- tively operated against the fault tolerant, fault detection and recovery operations as a primary aim of the disclosed invention in Smith. Moreover, Smith's basic teaching is that each module is, in fact, two identical copies of the same code distributed between separate processors for each operational unit. As such, we view the artisans' perspective of the teachings of Smith as Smith not suggesting a check for a newer version of the firmware between the PAS and the SAS.

In view of the foregoing, the decision of the examiner rejecting independent claims 22 and 25 under 35 U.S.C. § 103 is reversed. As such, the rejection of the respective dependent claims must also be reversed. Accordingly, the decision of the examiner is reversed.

<u>REVERSED</u>

JAMES D. THOMAS	)	
Administrative Patent Judge	)	
	)	
	)	
MICHAEL R. FLEMING	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
	)	
RICHARD TORCZON	)	
Administrative Patent Judge	)	

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